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No. 92-1223

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, and the U.S. DEPARTMENT OF DEFENSE, ARMY and AIR FORCE EXCHANGE, DALLAS, TEXAS, *Petitioners,*

v.

FEDERAL LABOR RELATIONS AUTHORITY and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTION

Pursuant to Rule 37.4 of the Rules of this Court, the National Right to Work Legal Defense Foundation, Inc. ("Foundation") moves for leave to file and hereby files this brief *amicus curiae* in support of petitioners. Pursuant to Rule 37.3 of the Rules of this Court, by letter dated April 20, 1993, to counsel representing the interest of the parties to the case, counsel for the Foundation requested consent to the filing of this brief.

When this brief went to print, counsel had received written consent from the Federal Labor Relations Authority ("FLRA") to the filing of this brief. Counsel has not received a response to his request from any of the other parties. Under cover letter to the Clerk of this Court, with the filing of this brief, counsel has provided copies of the letters he addressed to the representatives of the parties.

INTEREST OF THE *AMICUS CURIAE*

The Foundation is a charitable, legal aid organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. As such, the Foundation aids employees who have been denied, or coerced in the exercise of, their right to refrain from the collective activity foisted upon them by forced association. In the seminal cases of *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292 (1986) and *Communications Workers v. Beck*, 487 U.S. 735 (1988), Foundation attorneys helped to establish important precedents protecting individual employee rights in the workplace against the abuses of compulsory unionism. Similarly, in this case the Foundation is critically concerned about the rights of individual employees in the workplace as it relates to their privacy rights and their right to be free from harassment and intimidation at their personal residence. For these reasons, the Foundation respectfully files this brief in support of employee privacy rights.

SUMMARY OF THE ARGUMENT

The disclosure of federal employees' home addresses to the bargaining representative representing their bargaining unit is a clearly unwarranted invasion of the employees' personal privacy within the meaning of the Privacy Act and the Freedom of Information Act. This invasion of employee rights cannot be justified under a claim that a labor organization needs the information to fulfill its obligations under the Federal Services Labor-Management Relations Statutes. Federal employees enjoy the Right to Work free from any form of coerced union associa-

tion, and accordingly, a bargaining representative cannot demonstrate any legitimate work-related basis for requiring this very personal and private information. Rather, information such as this can be used as a mechanism for chilling the exercise of individual employee rights. For these reasons, individual rights should not be sacrificed for so-called "collective bargaining facilitation."

ARGUMENT

I. The Privacy Act is an unqualified right enjoyed by individuals to be free from interference in their private lives. To allow discovery of the home addresses of nonunion member employees by a labor organization with whom the employees have chosen not to associate is a blatant invasion of this right.

This case concerns one fundamental right enjoyed by every American, and that is the right to privacy. Whether this right is raised in the context of the United States Constitution or, as in this case, in the context of the Privacy Act, this Court must not accept the invitation to sacrifice this right to expedite organized labor's purposes, whether these purposes are purportedly "legitimate" or not. Allowing a labor organization to discover the home addresses of all employees—both union members and nonmembers—impinges on every employee's privacy interests.

That the Privacy Act of 1974, 5 U.S.C. § 552a(b) bars the release of home addresses of employees to any private entity cannot be seriously debated. The statute specifically provides that "[n]o agency shall disclose any record * * * except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." By its own terms, the statute is ***unqualified*** *vis-a-vis* the institutional prerogative of a private entity. Rather, the statute provides a very limited exception in favor of the *individual* enjoying the protection of the statute, to be exercised at his or her sole discretion.

There is no qualification in the Privacy Act that places a labor organization in a preferred status not subject to the clear language of the statute. Neither is there any statutory language or legislative history to support the conclusion that Congress intended to consider the interest in collective bargaining[1] that organized labor purports to enjoy under the Federal Service Labor–Management Relations Statute, 5 U.S.C. § 7114 ("FLRS") to eviscerate the protections that all individuals enjoy under the Privacy Act. Rather, the FLRS, by its own terms, provides that federal agencies are to furnish information to unions only "to the extent not prohibited by law," 5 U.S.C. § 7114(b)(4). It has not been suggested that the Privacy Act is not a law, nor is there any legislative exemption provided to labor organizations under the FLRS, or any other statute, to the requirements of the Privacy Act. This Court should not accept the invitation to create, by judicial edict, that which has not been developed by legislative process.

The most illustrative case showing the problems in allowing labor organizations to obtain employees' home addresses is presented in the FLRA case of *Department of Navy, United States Naval Ordnance Station*, 33 FLRA 3 (1988) in which a federal employee raised the very issue that concerns the Foundation as

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[1] In 1969, President Richard Nixon revised the rules governing labor relations in the federal service by amending § 1(a) of Executive Order 10988, 3 CFR 521 (1959-1963) with § 12 (c) of Executive Order 11491, 3 CFR 861, 870 (1966-1970), to make the federal service collective bargaining law read as follows:

> Section 1.(a) Employees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.
>
> [Section 12.](c) nothing in the agreement shall require an employee to become or to remain a member of a labor organization, or to pay money to the organization except pursuant to a voluntary, written authorization by a member for the payment of dues through payroll deductions.

an institution actively working on behalf of individual employees against the abuses of compulsory unionism. In *Naval Ordnance*, an employee wanted to keep his home address private because a union member had threatened and harassed him at home. The FLRA, however, chose to sacrifice this employee's rights in favor of the union's interest in "promoting collective bargaining." Since federal labor organizations enjoy the limited right to collective bargaining under federal labor law, subject to, *inter alia*, the Right-to-Work protections enjoyed by federal employees, the information on home addresses can be sought *directly* from the union's voluntary members. There is no legitimate basis for the compelled production of this personal information from nonmembers. Accordingly, the focus must be on the illegitimate purposes that can be accomplished through this information.

Harassment directed at nonunion member employees by union adherents is not foreign in the field of labor relations. Studies show that almost every variety of physical force and psychological intimidation is used to intimidate or coerce nonunion members. *See, e.g.*, A.J. Thieblot & T.R. Haggard, *Union Violence: The Record and the Response by Courts, Legislatures and the NLRB*, Labor Rel'ns & Public Policy Series #25 (Wharton School, Industrial Research Unit, U. of Pa.), 1983. Statistics presented by Thieblot and Haggard indicate that the violence oftentimes is directed at the homes of the victims of labor violence.

> Damaging automobile tires or other parts of cars is not, of course, an end in itself, but is instead a means of conveying a message to the owner. Usually the message pertains to the evils of crossing a picket line to work at a struck plant. Some attacks on automobiles are more-or-less random in nature, and do arise out of picket line confrontations. Others are more personal and, therefore, more frightening. Excluding for a moment the obviously heinous crimes (such as murder and assault with intent to kill), the most chilling forms of violence during labor disputes, are those which single out the victims as individual targets, particularly when the

> violence occurs away from the workplace. When one's car is firebombed in one's garage, when a shotgun blast comes through the bedroom window in the dead of night, when the phone rings once every twenty-five minutes for four days and delivers anonymous threats—those are the times that try men's souls, and cause them to ask themselves whether freedom is worth its price.

Id. at 487-88.

This Court has on several occasions recognized the sanctity of a home or private residence against unwanted intrusion. The home has been recognized as "the last citadel of the tired, the weary, and the sick." *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969). Further, "preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey v. Brown*, 447 U.S. 455, 471 (1980).

"One important aspect of residential privacy is protection of the unwilling listener." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

Organized labor has long used the picketing of homes of nonadherents as a form of intimidation or coercion. *See, e.g., Evening Times Printing & Publishing Co. v. American Newspaper Guild*, 124 N.J. Eq. 71, 199 A. 598 (1938); *Pipe Machinery Co. v. DeMore*, 36 Ohio Op. 342, 76 N.E.2d 725 (1947).

And unfortunately, labor violence and harassment is a fact of life in labor relations. Its effects can include death, personal injury and property damage. "The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt." *Frisby*, 487 U.S. at 486. "'To those inside * * * the home becomes something less than a home when and while the picketing * * * continue[s]. * * * [The] tension and pressures may be psychological not physical, but they are not, for that reason less inimical to family privacy and truly domestic tranquility.'" *Carey*, 447 U.S. at 478 (Rehnquist, J. dissenting) (quoting

Wauwatosa v. King, 49 Wis.2d 398, 411-12, 182 N.W.2d 530, 537 (1971)). This form of coercion has not lessened with the passage of time, and such circumstances will continue unabated unless actions are taken and employee rights are protected to prevent the facilitation of organized labor's illegitimate goals. This action must include refusing to facilitate the process of harassment and intimidation by providing the home addresses of individual employees who have chosen *not to* participate in collective bargaining.

II. The purpose of the Freedom of Information Act is to foster public understanding of the actions of government, not "to simplify the process of collective bargaining."

It is respectfully suggested that the Freedom of Information Act ("FOIA") provides no basis whatsoever for undermining the protections employees enjoy under the Privacy Act. The core purpose of the FOIA is defined as "'contribut[ing] significantly to public understanding *of the operations or activities of the government*.'" *United States Department of Justice v. Reporters Committee*, 489 U.S. 749, 775 (1989) (emphasis in original).

In all of the briefs reviewed by counsel, neither the represented labor organizations nor the Federal Labor Relations Authority has yet to provide a cogent explanation as to how organized labor's possession of this private information in any way serves the interest of advancing *public understanding* of the operation of government. The *labor organizations* have only one interest, and that interest is to serve their own political and social agenda. This interest is not to advance public understanding of government, but rather to advance organized labor's institutional prerogatives.

As recognized in *United States Department of Navy v. Federal Labor Relations Authority*, 975 F.2d 348, 355 (7th Cir. 1992) (emphasis in original), "the *only* public interest cognizable under FOIA is the interest of the citizenry in obtaining information about the activities of its government." The federal labor

organizations and the Federal Labor Relations Authority miss the main thrust of this statutory mandate by substituting the *labor organization's* purported institutional interest for the *public's interest*, and further pervert the statute by removing the focus from the interest of the *citizenry* in obtaining information about the activities of the *government* and inserting in its stead the interest of *organized labor* in obtaining personal information about employees in the workplace. *Cf. Elrod v. Burns*, 427 U.S. 347, 362 (1976) (in First Amendment context, "care must be taken not to confuse the interest of partisan organizations with governmental interests").

In short, neither the FOIA nor the FLRS grants rights, powers, or privileges to federal sector *labor organizations*. Rather, *employees* are immunized by the Privacy Act from interference in their private lives. These protections, emanating from constitutional rights, powers, and privileges grounded in the Fifth Amendment of the United States Constitution, cannot be sacrificed for whatever veiled purpose a labor organization might articulate in the context of collective bargaining.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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